MANION MCDONOUGH & LUCAS, P.C.
ATTORNEYS AT LAW

600 GRANT STREET
SUITE 1414
PITTSBURGH, PENNSYLVANIA 15219-2702

(412) 232-0200

FAX (412) 232-0206

October 23, 2007

Marcia M. Waldron, Clerk
Office of the Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: WRS, Inc. v. Plaza Entertainment, Inc.; No. 07-1712

Dear Ms. Waldron:

Enclosed for filing with the Court please find an original and 3 copies of a Motion to Remand. An extra copy is also enclosed which I request that you time-stamp and return to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance with this filing and please call with any questions.

Very truly yours,

MANION MCDONOUGH & LUCAS, P.C.

By:
James R. Walker

JRW/kp
Enclosure
cc: John P. Sieminski, Esquire
Thomas E. Reilly, Esquire
John M. Gibson, Esquire

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	
Appellee,	)	Civil Action No. 07-1712
vs.	)	
JOHN HERKLOTZ, an individual,	)	
Appellant.	)	

APPELLEE CHARLES VON BERNUTH'S MOTION TO REMAND OR, IN THE ALTERNATIVE, FOR STAY

Appellee, Charles Von Bernuth ("Mr. Von Bernuth"), by his undersigned counsel and pursuant to Federal Rule of Appellate Procedure 27, hereby files this Motion to Remand or, in the Alternative, for Stay, requesting remand of this case to the United States District Court for the Western District of Pennsylvania or, in the alternative, a stay of proceedings in this Court, and averring in support thereof as follows:

1. On August 17, 2007, prior counsel for Mr. Von Bernuth filed a Response to an Application to Strike his appearance in this case. That Response set forth the reasons why there is no final order of the district court in this case and jurisdiction under 28 U.S.C. 1291 is therefore lacking.

2. In brief, that Response noted the following facts with respect to the issue of finality: (a) that no judgment was ever entered in this matter pursuant to Federal Rule of Civil Procedure 58; (b) that no Rule 54(b) determination of finality was made with respect to any ruling in the case; (c) that the district court did not dispose of all claims and all parties in either the Order from which appeal was taken or any other order entered in the case and (d) that the "severance" of certain claims for transfer to the United States District Court for the Central District of California for adjudication could not operate to impart finality.

3. The cases make clear that in the absence of an explicit determination of finality under Federal Rule of Civil Procedure 54(b), jurisdiction under 28 U.S.C. § 1291 does not exist to review an order disposing of less than all claims. *See Berckeley Investment Group Ltd. v. Colkitt*, 259 F.3d 135 (3d Cir. 2001).

4. For the same reasons set forth in greater length in the Response to Application to Strike, Mr. Von Bernuth now requests that the Court remand this case to the district court for further proceedings to resolve all of the claims asserted by the parties in the case.

5. Moreover, even independent of the non-final nature of the Order from which the appeal was taken, good and sufficient reasons exist for a remand of the case at this time.

6. On October 16, 2007, Mr. Von Bernuth filed with the district court a Motion for Reconsideration or for Relief under Fed. R. Civ. P. 60(b) (Dkt. No. 150) (Exhibit A hereto) detailing the gross neglect of Mr. Von Bernuth's prior counsel in allowing a default judgment to be taken against Mr. Von Bernuth.

7. Prior counsel's egregious misconduct left Mr. Von Bernuth effectively unrepresented, and therefore relief under Federal Rule of Civil Procedure 60(b)(6) is supported by this Court's precedent. *See, e.g., Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806-08 (3d Cir. 1986); *Boughner v. Secretary of Health, Education & Welfare*, 572 F.2d 976, 978-79 (3d Cir. 1978).

8. The papers filed by Mr. Von Bernuth in the district court in support of his Motion include a brief (Dkt. No. 151) and several affidavits (Dkt. Nos. 152-154), including the Affidavit of John W. Gibson, Mr. Von Bernuth's prior counsel. These voluminous documents are not attached to this Motion but are available for the Court to review through the district court's electronic case filing system.

9. Mr. Von Bernuth respectfully submits that his Motion in the district court sets forth grounds for relief from the Rule 55(a) default entered against him with respect to liability in the case as well as from the subsequent order establishing the amount of liability as $2,584,749.03.

10. The district court has ordered that responses to Mr. Von Bernuth's Motion be filed by November 2, 2007 and that a reply brief be filed by November 13, 2007. In the order setting the schedule, however, the district court called upon the parties to address the issue of the district court's jurisdiction to rule on Mr. Von Bernuth's Motion in light of the pending appeal.

11. Under the law in this circuit, the district court has jurisdiction to entertain Mr. Von Bernuth's Motion, and it has jurisdiction to deny it. The district court, however, cannot grant the Motion without a remand by this Court, although if the district court is inclined to grant the motion it can signify to this Court its intention to do so if given the power. *See United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner & Smith*, 971 F.2d 974, 988 (3d Cir. 1992); *Main Line Fed'l Sav. & Loan Assoc. v. Tri-Kell, Inc.*, 721 F.2d 904, 906-08 & n.7 (3d Cir. 1983).

12. In this case, no party will suffer any prejudice by a remand for consideration and adjudication of Mr. Von Bernuth's Motion at this time. The

Motion will be fully briefed by November 13, 2007. If the Motion is denied by the district court, Mr. Von Bernuth can then join in the proceedings on this appeal and the general policy disfavoring piecemeal appeals will be promoted.[1]

13. On the other hand, if Mr. Von Bernuth's Motion is granted, it may be that based on the additional factual information and documentation now placed in the record, Mr. Herklotz might seek to file his own motion for reconsideration or for relief under Rule 60(b). If he declines to do that and still seeks to appeal, he could request the Rule 54(b) certification of finality with respect to the judgment against him that is currently absent from the record and thereby establish this Court's jurisdiction to hear the appeal.

WHEREFORE, Appellee Charles Von Bernuth respectfully requests that the Court enter an order remanding this case to the district court for further proceedings and consideration of Mr. Von Bernuth's Motion for Reconsideration or Relief under Rule 60(b). In the alternative, to the extent that this Court is not inclined to remand until after the district court has indicated willingness to grant Mr. Von Bernuth's Motion for Reconsideration or Relief Under Rule 60(b), Mr. Von Bernuth respectfully requests that proceedings in this Court be stayed until the district court either denies or indicates its intention to grant Mr. Von Bernuth's Motion for Reconsideration or Relief Under Rule 60(b).

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[1] This case has already been the subject of one previous appeal from a non-final order that has delayed the ultimate resolution. *WRS, Inc. v. Plaza Entertainment, Inc.*, 402 F.3d 424 (3d Cir. 2005).

Respectfully submitted,

James R. Walker, Esquire
Pa I.D. # 42175
jwalker@mmlpc.com
Manion McDonough & Lucas, P.C.
600 Grant Street, Suite 1414
Pittsburgh, PA 15219
(412) 232-0200

Attorneys for Appellee

Date: October 23, 2007

N THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation	)	
Plaintiff,	)	No. 2:00-CV-2041-AJS
v.	)	
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual	)	
Defendants	)	

MOTION FOR RECONSIDERATION OR FOR RELIEF FROM JUDGMENT

Defendant Charles von Bernuth, by and through his undersigned counsel and pursuant to Federal Rule of Civil Procedure 60(b)(6), or, in the alternative, pursuant to this Court's inherent authority to reconsider its prior rulings, hereby files this Motion for Reconsideration or for Relief from Judgment, and support thereof avers as follows:

1. Throughout that history of this case, Defendant Charles von Bernuth, as well as Defendants Eric Parkinson and Plaza Entertainment, Inc., were represented by John W. Gibson, a member of the bar of the Supreme Court of Pennsylvania and of this Court. (Affidavit of John W. Gibson in Support of Defendant Charles von Bernuth's Request for Relief Under Fed. R. Civ. P. 60 ¶¶3-4.)

2. From the beginning of this seven-year representation, Attorney Gibson made only sporadic and cursory of reports to Mr. von Bernuth, with months and sometimes even more than

EXHIBIT
A
ALL-STATE LEGAL®

a year passing with no contact between Attorney Gibson and Mr. von Bernuth. (Affidavit of Charles von Bernuth in Support of Request for Relief Under Fed. R. Civ. P. 60 ¶ 6.)

3. This lack of communication did not cause Mr. von Bernuth alarm. He had no prior experience with Pennsylvania litigation and did not know what level of communication to expect from his attorney. Moreover, the few reports that Mr. von Bernuth did receive indicated to Mr. von Bernuth that Attorney Gibson had the case in hand and that things were proceeding well. Id. ¶ 7.

4. Indeed, by Order of February 14, 2002, the case was administratively closed, and on September 15, 2003, this Court denied a motion by Plaintiff WRS, Inc. ("WRS") to reopen the case.

5. WRS took an appeal from the denial of its motion to reopen the case, and, following that appeal, on July 29, 2005, this Court entered an order reopening the case.

6. On March 9, 2006, a status/settlement conference was conducted. At that conference, this Court set March 23, 2006 as the date for parties to file motions for summary judgment. This Court also determined that the parties should at their equal cost employ Schneider Downs as an accountant to review WRS' account records, which were in dispute. (Gibson Affidavit ¶ 9.)

7. Attorney Gibson informed Mr. von Bernuth that Mr. von Bernuth might at some point be required to make a payment for accountant fees and told him that he would contact him when the amount of the payment was determined. (Gibson Affidavit ¶¶ 12-13; Von Bernuth Affidavit ¶ 10.)

8. This was the last contact Mr. von Bernuth received from Attorney Gibson. (Gibson Affidavit ¶¶ 17-36; Von Bernuth Affidavit. ¶ 13-17.)

9. Attorney Gibson never followed up with Mr. von Bernuth when the amount was determined, nor made any effort to collect or make the required payment. (Gibson Affidavit ¶ 19.)

10. Given the prior course of dealing between Mr. Gibson and Mr. von Bernuth, where Mr. von Bernuth frequently would not hear from Mr. Gibson for long periods of time, he did not think anything was amiss, but assumed that the payment either had not yet been determined or had proved unnecessary. (Von Bernuth Affidavit ¶ 14.)

11. In fact, on April 12, 2006, about a month after the case status/settlement conference that Attorney Gibson attended, WRS filed a Motion to Show Cause Why a Default Should Not Be Entered as to Defendant Charles Von Bernuth. The Motion recited the failure to file a Motion for Summary Judgment and the failure to make a payment of a portion of the accountant's fee as a purported basis for concluding that Mr. von Bernuth no longer intended to defend the matter.

12. Attorney Gibson neither notified Mr. von Bernuth of the filing of this Motion nor filed any response. (Gibson Affidavit ¶¶ 22-23.)

13. On April 18, 2006, this Court entered an Order requiring Mr. von Bernuth to show cause why he should not be defaulted. A response date of April 25, 2006 was set.

14. Attorney Gibson again failed to advise Mr. von Bernuth of the filing of this Order and did not respond to the Order. Id. ¶ 25.

15. On April 28, 2006, the Court directed the Clerk to enter a default under Rule 55(a) against Mr. von Bernuth, and a default was entered that same day.

16. Continuing his pattern of gross neglect of his professional obligations to Mr. von Bernuth, Attorney Gibson did not advise Mr. von Bernuth of the entry of a default. See id. ¶ 27. Likewise, he did not take any action on behalf of Mr. von Bernuth to open the default or have the matter reconsidered. See id. ¶ 28.

17. On October 13, 2006, a Motion for Default Judgment was filed against Mr. von Bernuth, who had also by this time been defaulted. The Motion sought to fix the amount of Mr. von Bernuth's liability in excess of $2.5 Million.

18. Again, in gross dereliction of his duties, Attorney Gibson failed to notify Mr. von Bernuth of the filing of this Motion. See id. ¶ 30. He also failed to make any response to the Motion on his behalf. See id.

19. On February 20, 2007, the Court entered an Order granting a judgment against Mr. von Bernuth in the sum of $2,584,749.03.

20. Not surprisingly, Mr. Gibson did not notify Mr. von Bernuth that a judgment of more than $2.5 million had been entered against him. (See id. ¶¶ 35-36, 41-42; Von Bernuth Affidavit ¶¶ 15-16.) He made no attempt to induce this Court to reconsider the judgment. He filed no appeal from the judgment. He simply did nothing. (Gibson Affidavit ¶¶ 34-38.)

21. On May 21, 2007, Attorney Gibson's other client, Defendant Eric Parkinson, sent an email to Mr. Von Bernuth, on which Attorney Gibson was copied. (*See* Exhibit 1 to Exhibit A hereto.) In the e-mail, apparently unaware of the appeal more than four years previous, Mr.

Parkinson expressed his understanding that the case against himself, Mr. von Bernuth and Defendant Plaza Entertainment had been dismissed.

22. Attorney Gibson emailed Mr. Parkinson a response in which he informed him **for the first time** that default judgments had been entered against him and against Mr. Von Bernuth. (Gibson Affidavit. ¶ 36; Exhibit 1 to Gibson Affidavit.)

23. Even then, however, Attorney Gibson sought to minimize the significance of such judgments, stating that there was a strong basis for reversal on appeal, notwithstanding the fact that the appeal to which he referred was taken only by Defendant Herklotz. (Gibson Affidavit ¶ 37; Exhibit 1 to Gibson Affidavit.) He indicated to Mr. Parkinson that he would be willing to enter an appearance in the Herklotz appeal if Mr. Parkinson would bring his bill current. (*See* Exhibit 1 to Gibson Affidavit.)

24. In fact, it was Mr. Parkinson's alleged failure to pay Attorney Gibson's fees that appears to have been the immediate cause of Attorney Gibson's inexcusable dereliction in his duty to defend his clients. (Gibson Affidavit ¶¶ 13-17.)

25. Attorney Gibson acknowledges, however, that Mr. von Bernuth always faithfully paid Mr. Gibson for his services. See id. ¶¶ 14, 40. Moreover, Mr. von Bernuth never indicated any problem or difficultly in continuing to do so or in paying his share of the accountant's fee at such time as an amount was determined. See id.

26. Shortly after Mr. Parkinson received the May 21, 2006 email from Attorney Gibson informing him of the judgments against himself and Mr. von Bernuth, Mr. Parkinson in turn informed Mr. von Bernuth. (Gibson Affidavit ¶¶ 36-37, 41; Von Bernuth Affidavit ¶ 16.)

This was the first that Mr. von Bernuth heard of the more than $2.5 million judgment that had been entered against him. See id.

27. He promptly obtained new counsel, first in California, and then in Pennsylvania. (Von Bernuth Affidavit ¶¶ 18-19; Exhibit 1 to Gibson Affidavit.)

28. In sum, Attorney Gibson was repeatedly and inexcusably derelict in his nonperformance of his professional duties to provide competent representation to Mr. von Bernuth, *see* Pennsylvania Rule of Professional Conduct 1.1, to act with reasonable diligence and promptness in representing Mr. von Bernuth, *see* Pennsylvania Rule of Professional Conduct 1.3, and to keep Mr. von Bernuth informed about the status of the case and explain the case sufficiently to permit Mr. von Bernuth to make informed decisions regarding the representation, *see* Pennsylvania Rule of Professional Conduct 1.4.

29. Attorney Gibson himself acknowledges that he has "no excuse for [his] failure to properly defend clients for which [he] had entered an appearance that has never been withdrawn . . . [and] for his conduct in failing to keep Mr. Von Bernuth informed and advised that a default was being entered against him and later that his liability was being fixed in an amount in excess of $2.5 Million without opposition by [Attorney Gibson]." (Gibson Affidavit ¶¶ 39, 41.)

30. Attorney Gibson's neglect amounted to an abandonment for which Mr. von Bernuth was in no way responsible.

31. To permit the judgment against Mr. von Bernuth to stand in these circumstances would be an injustice that would undermine public confidence in the administration of justice.

32. This is particularly true where Mr. von Bernuth in fact has numerous meritorious defenses to WRS's claims against him, which, through his counsel's dereliction, were not presented to this Court.

WHEREFORE, Defendant Charles von Bernuth respectfully requests that this Court enter an Order vacating the judgment against Mr. von Bernuth as to both liability and damages and thereby affording Mr. von Bernuth the opportunity to defend on the merits.

Respectfully submitted,

/s/ James R. Walker

James R. Walker, Esquire
Pa I.D. # 42175
Manion McDonough & Lucas, P.C.
Firm I.D. No. 786
600 Grant Street, Suite 1414
Pittsburgh, PA 15219
jwalker@mmlpc.com
(412) 232-0200

Attorney for Defendant Charles von Bernuth

Date: October 16, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by U.S. First Class Mail, Postage Pre-Paid, upon the on this 23rd day of October, 2007, as follows:

John P. Sieminski, Esquire
Burns, White & Hickton, LLC
Four Northshore Center
106 Isabella Street
Pittsburgh, PA 15212

Thomas E. Reilly, Esquire
2025 Greentree Road
Pittsburgh, PA 15220

John W. Gibson
912 Fifth Avenue
Pittsburgh PA 15219